IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

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No. 263

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY, JOHN MORRELL & COMPANY, AND WILSON & CO., INC.,
Plaintiffs-Petitioners,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
Defendants-Respondents.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, ET AL.,
Plaintiffs-Respondents,

vs.

ARMOUR AND COMPANY, SWIFT AND COMPANY, THE CUDAHY PACKING COMPANY AND SUPERIOR PACKING COMPANY,
Defendants-Petitioners.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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September 14, 1951.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

This brief is filed on behalf of the sixteen carrier respondents,* appellees in the Court of Appeals. Since the

* The Alton Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Chicago and North Western Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago Great Western Railway Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Chicago, Rock Island

printed record in this Court does not contain a reproduction of a large number of original exhibits which were retained as a part of the record in the Court of Appeals pursuant to stipulation of the parties (R. 285-7) and certified to this Court (R. 341), and since it is necessary for respondents to direct this Court's attention to portions of some of those exhibits, reference is hereinafter made thereto by name and number.

OPINION BELOW.

The opinion of the Court of Appeals (R. 325-36) is reported at 188 F. 2d 603, *Armour & Co.* v. *Chicago, M. St. P. & Pac. R. Co.*

JURISDICTIONAL BASIS.

Respondents agree with petitioners that this Court has jurisdiction to review the judgment below under 28 U. S. C. A. Sec. 1254. This case, however, does not, as stated by petitioners (Petition 7), present any question of interpretation of the Interstate Commerce Act, but merely involves questions of construction of certain freight tariffs.

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and Pacific Railroad Company, Chicago, St. Paul, Minneapolis and Omaha Railway Company, Great Northern Railway Company, Gulf, Mobile and Ohio Railroad Company, Illinois Central Railroad Company, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Northern Pacific Railway Company, Union Pacific Railroad Company, and Wabash Railroad Company. (R. 270-1.)

QUESTIONS PRESENTED.

The ultimate questions presented are as follows:

1. Whether, as used with reference to rates in certain tariff rules involved in this case, the words "named" and "published" mean specifically named or specifically published rates, as held by the Court of Appeals, or whether, as claimed by respondents, they meant rates established in any manner?

2. Whether the rule that preference should be given to a construction of a tariff which will not result in unauthorized departures from the long-and-short-haul clause of the Interstate Commerce Act applies to tariffs whose meaning is clear and which expressly stated that the departures appearing therein were authorized by the Interstate Commerce Commission?

3. Whether an intermediate-point rule in a tariff can be invoked to extend the application of the rates named therein to an unnamed point beyond the territorial limitations stated on the title page of the tariff and in the rate-naming item itself?

4. Whether any of the foregoing questions is of sufficient importance to justify consideration thereof by this Court?

STATEMENT OF THE CASE.

These are, for the most part, actions brought by petitioners against respondent railroads claiming freight-rate overcharges on numerous carloads of fresh meats shipped from western packing plants to eastern destinations between May 1, 1939, and July 1, 1941. There are also involved a few undercharge suits brought by some of the respondents against certain of the petitioners relating to shipments during the same period. The arguments of petitioners in support of their overcharge claims and in defense of the undercharge actions rest on tariff contentions that neither the District Court nor the Court of Appeals could be persuaded to accept. Petitioners now seek review by this Court, asserting that the Court of Appeals has struck down "one of the keystones of the national freight rate structure," and that "chaos and confusion" are about to overwhelm the commerce of the nation. (Petition 4.)

Respondents submit that the decision below presents no cause for alarm—and this observation is not an attempt at levity. No amount of dramatic characterization can make these cases anything but a rather narrow dispute over the meaning and application of certain freight tariff language. Nor is there any occasion for this Court to review this mass of freight claims. The Court below decided the cases correctly; and even if it had erred in any respect, which it did not, no substantial and important federal question could possibly be presented. A brief outline of the character of claim involved will show that no justification exists for granting the requested writ.

Fresh meats move from packing plants on the Missouri River and from other western origins to the East on rates that have, for the most part, been fixed by the Interstate Commerce Commission. A full review of this rate structure would show that petitioners' contentions are wholly incompatible with several fundamental bases of the rate adjustment. Such a review would consume more space than can be spared here; but the history of the rates and the significance of the various rate interrelations were considered at length by the District Court, and that Court made the following important finding of fact:

> "A review of decisions of the Interstate Commerce Commission shows that the rates on fresh meats from western and midwestern origins to eastern destinations follow a very definite pattern, and are part of a delicately balanced adjustment prescribed or approved by the Commission. The shippers' claims are based upon interpretations of the tariffs which would retroactively disrupt that rate adjustment." (R. 202, fdg. 18.)

The through rates on fresh meats from the West to the East are, in general, combinations of separately established rates. On a shipment from Kansas City, Kans., to New York City, for example, the western rate factor covers the movement from origin to the Mississippi River, and the eastern factor covers the movement from the Mississippi River to destination.* In devising the rather intricate rate structure on this commodity the Commission undertook to provide that the through combinations between the various origins and destinations should equalize via all

* The cases were tried, in large part, on a stipulation of facts which, among other things, selected certain shipments as illustrative of the claims presented. One of the typical shipments was from Kansas City to New York City. (R. 289-320.)

gateways and routes, with the result that the western factor is the same regardless of which of the western railroads transports the shipment or via which Mississippi River crossing it moves. (R. 202; Carriers' Exs. 4-7.) During the time involved in these cases, as the Court below found, the applicable through rate from Kansas City to New York was $1.21 per 100 pounds, made up of a western factor of 30 cents and an eastern factor of 91 cents. (R. 327, 333-4.) These were the rates specifically published, respectively, in the western and eastern lines' tariffs. Petitioners seek to reduce this through rate to $1.13.

As the opinion of the Court below shows, the argument by which this rate cut is sought to be accomplished is somewhat involved when traced step by step through the tariffs, but geographically it amounts simply to contending that the western factor, published specifically from Kansas City to the Mississippi River, may be applied over a route from Kansas City to a Mississippi River crossing via Chicago, Ill., thus making Chicago an intermediate point for rate application purposes. Naturally the eastbound rate from Chicago to New York is lower than from the Mississippi River crossings to New York (in these cases 8 cents lower); so that if the through rate could be made by a combination that used the western factor all the way to Chicago rather than only to a Mississippi River crossing, the total transportation charge could be reduced by the difference in the eastern factors. Another of the claims attempts to draw the Kansas City-Chicago rate eastwardly to Kokomo, Ind., in constructing a combination that would defeat the normally applicable rate on certain shipments by 3½ cents. Still another claim, originally pressed with considerable force, was that the rate from Louisville, Ky., to New York City could be drawn back westwardly for about 275 miles and applied from East St. Louis, Ill., as an intermediate origin point. The District Court rejected this last claim

along with the rest, and petitioners abandoned it on appeal to the Court of Appeals.* (R. 205, 259-60, 293-7, 312.)

Petitioners' claim that intermediacy of the foregoing sort reduced the normally applicable rates on the shipments involved rests upon an important and much-used tariff rule known as the intermediate-point rule. The Court below did not, however, misunderstand or misapply that rule, as petitioners assert. The Commission wrote the intermediate-point rule, and prescribed its use as a convenient device for providing thousands of rates to and from thousands of small stations, thus enabling the carriers to satisfy Section 6 of the Interstate Commerce Act (49 U. S. C. A. Sec. 6(1)) without the tremendous burden of specifically publishing a multitude of individual rates that would have little commercial use. The rule also serves the important function of avoiding violations of the long-and-short-haul provision of Section 4. (49 U. S. C. A. Sec. 4(1).) When incorporated in any tariff, the rule in essence provides that if an instance is found in which no rate is named to a given station, but that station is intermediate on a route to a point to which a rate is published, the rate applicable to such intermediate station is the rate published to the point beyond. (R. 328, note 3.)

There is no real issue here concerning the purpose and meaning of the intermediate rule. The Court below merely held that certain other tariff provisions upon which petitioners necessarily relied to support their use of the rule did not have the meaning which petitioners sought to read into them. No important national issue is involved in that decision; and it is also correct.

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*As originally filed, the 230 overcharge suits, which were consolidated into one action by the District Court, covered the period from May 1, 1939 to August 31, 1948. (R. 198.) On appeal, petitioners eliminated all claims on shipments which moved after July 1, 1941, all claims based on shipments that originated at East St. Louis, Ill., and certain claims with respect to other shipments prior to July 1, 1941. (R. 259-60.)

That the Court below committed no error in finding the legally applicable rates in these cases to be what the tariffs specifically showed and what respondents claimed is proven, as we shall briefly explain, by an analysis of the particular provisions of the tariffs in question. It is also demonstrated by one of the most persuasive of all forms of evidence—the contemporaneous practical construction of the Commission, which fixed most of the basic rates, and of the petitioners, which, as large and important members of the meat-packing industry, used the rates in countless routine daily transactions, and in formal proceedings before the Commission repeatedly stated their understanding that the applicable rates under consideration were precisely what the Court of Appeals and the District Court found them to be.

ARGUMENT.

I.

THE COURT OF APPEALS DID NOT OVERRULE ANY DECISION OF THE INTERSTATE COMMERCE COMMISSION WITH RESPECT TO THE INTERMEDIATE-POINT RULE.

The contention of petitioners (Petition 3, 9-13, 23-4) that the decision of the Court of Appeals overruled a long line of decisions of the Commission concerning the intermediate-point rule rests upon an inaccurate analysis of the Court's opinion with respect to the rate applicable from Kansas City to Chicago on the shipment designated as No. 2 in the stipulation of facts, and agreed upon as illustrative.

The governing tariff, Tariff 1-X, named in Section 2 a specific rate of 40 cents from Kansas City to Chicago, and in Section 1 a 30-cent rate from Kansas City to various Mississippi River crossings, including East Dubuque, Ill. Section 1 named no rate to Chicago but contained an intermediate-point rule. The precise question presented was whether, by reason of the so-called priority rules governing the several sections of the tariff, the applicable rate from Kansas City to Chicago was the 30-cent rate constructed in Section 1 under the intermediate-point rule or the 40-cent rate specifically published in Section 2. (R. 327-8, 333-4.)

The pertinent rule of construction, which has never been in dispute, is "that a specific rate always takes precedence over a rate made by the use of an intermediate rule * * * unless there are published tariff provisions necessary to make clear, and give effect to, a purpose to have rates resulting from the intermediate rule apply to the exclusion of

rules, are synonymous with "established." When analyzed, this suggestion amounts to a claim that a 30-cent rate was "established" in Section 1 from Kansas City to Chicago within the meaning of the priority rules, but that no rate was "established" in that section from Kansas City to Chicago within the meaning of the intermediate rule. If "established" be substituted for "published" and "named" in both the priority and intermediate rules, the priority rules would give preference to rates "established" in Section 1; but there would *not* be any such rate in Section 1 from Kansas City to Chicago to which preference could be given. In order to find a rate "established" in Section 1, petitioners are forced to invoke the intermediate rule. But when "established" is substituted for "published" and "named" in that rule, petitioners' contention collapses; for the rule, so reworded, could *not* be used to construct a rate from Kansas City to Chicago because it would then provide that it could be so used *only* if Chicago was a "point of destination to which a commodity rate * * * is *not established*" in Section 1. (R. 328, note 3; emphasis supplied.)

The argument advanced by the petitioners to escape the specifically named rate from Kansas City to Chicago in Section 2 is thus one of expedient inconsistency. In order to claim the benefit of the priority rules, petitioners say that a rate was "established" in Section 1; but in the same breath, in order to invoke the intermediate rule in Section 1, they are forced to say that there was no rate "established" in that section. The Court of Appeals properly refused to adopt a construction of tariff language that yields so obviously to the needs of the moment.

Petitioners contend that the words "named," "published," "specified," "fixed" and "established" all have the same meaning, citing *United States* v. *Miller*, 223 U. S. 599. (Petition 16.) That case is not in point here. It

presented the question whether an indictment against a shipper for soliciting a rebate must allege that the tariff containing the rates had been posted in the carrier's depot as required by the Interstate Commerce Act; and this Court properly held that failure to post or keep posted a tariff on file with the Commission could not have the legal effect of freeing a shipper from liability for soliciting a rebate from the rates provided in the tariff. Obviously, it was of no concern in such a situation whether the rates were specifically named, or whether they were provided for by a formula such as the intermediate rule. The question here is not whether a rate had legal existence within the meaning of the Interstate Commerce Act or the Elkins Act. The question is whether the rate which petitioners must construct by use of the intermediate rule is a specifically named rate within the meaning of the particular tariff language here involved. The facts and the law clearly support the decision of the Court of Appeals rejecting petitioners' contentions on this issue.

II.

THE COURT OF APPEALS DID NOT CONSTRUE THE TARIFFS INVOLVED IN SUCH MANNER AS TO CREATE VIOLATIONS OF THE INTERSTATE COMMERCE ACT.

On the authority of *Great Northern Ry. Co.* v. *Delmar Co.*, 283 U. S. 686, petitioners argue (Petition 6, 13-14) that the construction placed by the Court of Appeals upon the pertinent language of the western carriers' tariffs would result in violations of the long-and-short-haul clause in Section 4 of the Interstate Commerce Act. (49 U. S. C. A. Sec. 4(1).) Eight alleged violations are cited (Petition 27) as illustrations, none of which affects rates here involved.

Section 4 of the Act does not, as petitioners would seem to argue, contain an absolute prohibition against rates

that are higher for shorter than for longer distances over the same route. Instead, Section 4 prohibits such rates unless they are "authorized by the Commission."

All that was held in the *Delmar* case is that where two constructions of a tariff are possible, one of which would result in an unauthorized Fourth Section departure, preference must be given to that which does not result in a violation of the statute. Since petitioners' construction is not a reasonably possible one, the *Delmar* case is not pertinent. In rejecting an argument similar to that here advanced, the Commission said in *Swift & Co.* v. *Alton R. Co.*, 263 I. C. C. 245, 252:

> "The principle in the case last cited [*Delmar* case] cannot be used to nullify or to change specific tariff provisions."

There is no evidence that the Fourth Section departures cited by petitioners were not authorized by the Commission. On the other hand, all of the western carriers' tariffs here involved specifically stated that they contained rates that were higher for shorter than longer distances over the same route, and gave reference to orders of the Commission granting authority to maintain such rates.* In these circumstances, it must be presumed that the carriers had authority from the Commission for all Fourth Section departures found in the tariffs.

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*A typical statement is found in Item 55 of Tariff 1-X, as follows:

> "Fourth Section Departures. This tariff contains rates that are higher for shorter than longer distances over the same route. Such departure from the terms of the Amended Fourth Section of the Interstate Commerce Act is permitted by authority of Interstate Commerce Commission Fourth Section Order or Orders, as indicated in individual items, and by authority of Fourth Section Orders Nos. 13000 and 13001 of October 19, 1937, and 13050 of March 8, 1938." (Shippers' Ex. 12, p. 6.)

Similar items are found in the other tariffs. (Tariff 1-Y, Item 55, Shippers' Ex. 16, p. 8; Tariff 5-R, Item 131, Joint Ex. 11, p. 21.)

The case of *American Ry. Express Co.* v. *Lindenburg*, 260 U. S. 584, is directly in point. One of the questions there presented was whether the express carrier had been authorized by the Commission to establish rates dependent upon the declared or agreed value of the property transported. The carrier had filed a tariff with the Commission naming rates of that character, and had given reference in the tariff to an order of the Commission. At page 589 the Court said:

> "If these facts do not warrant the logical inference of a grant of authority [by the Commission], they do afford the basis for a legal presumption to that effect, for, if petitioner [carrier] was not duly authorized by the Commission, its action in attempting to limit its liability was unlawful, * * *."
>
> "In the absence of proof to the contrary, we, therefore, indulge the presumption that in basing its transportation charges upon the values recited in the receipt, the petitioner had due authority."

In *Swift & Co.* v. *Alton R. Co.*, 262 I. C. C. 783, it was urged by shippers that the defendant carriers' construction of a particular tariff rule would result in Fourth Section departures; but the Commission said at page 792:

> "But that argument overlooks the fact that in instances where such departures occur * * * the carriers generally have obtained appropriate relief from section 4(1)."

Since there is no evidence to show that the carriers participating in the tariffs here involved did not have authority from the Commission for the Fourth Section departures contained therein, petitioners' reliance upon the *Delmar* case is without foundation.

III.

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THE INTERSTATE COMMERCE COMMISSION RELATING TO THE EFFECT TO BE GIVEN TO THE TITLE PAGE OF A TARIFF.

There is no merit to the claim (Petition 4-5, 17-19, 27-9) that in determining the rate applicable to Shipment No. 2-A the Court of Appeals nullified the ruling of the Commission in *Armour & Co.* v. *C. B. & Q. R. Co.*, 215 I. C. C. 537, with respect to the effect of the territorial description on the title page of a tariff upon the construction of the rules contained in the body of the tariff. Shipment No. 2-A moved from Kansas City to New York, and was governed by Tariff 1-Y. Section 2 of this tariff contained a specifically published rate from Kansas City to Hammond, Ind., a point in the Chicago Switching District. Petitioners sought to use this rate as the western factor of the through combination, and claimed that it could be applied at Kokomo, Ind., a point 75 miles east of Hammond, under the intermediate rule.* (R. 312; Shippers' Ex. 16, p. 14, Item 5510.)

Petitioners' argument is based upon three false premises, namely: (1) that the territorial description on the title page of Tariff 1-Y was general and non-restrictive, (2) that the tariff contained a specifically published rate from Kansas City to Kokomo, and (3) that the Court of Appeals by mere inference, drawn from the fact that Kokomo was outside the territorial description found on

* The suggestion of petitioners (Petition 15-16) that the Court of Appeals was inconsistent in its rulings on Shipments Nos. 2 and 2-A is without merit. Different questions of tariff construction were presented. The tariff governing Shipment 2-A contained no rates from Kansas City to any of the Mississippi River crossings which could possibly be applied at Chicago under the intermediate rule, and thus did not present any question of priority as between a specifically published rate and an intermediate-rule rate.

the title page of the tariff, nullified the specifically published rate to Kokomo.

The territorial coverage stated on the title page of the tariff is set forth in the opinion of the Court of Appeals. (R. 336.) The only Indiana points covered were "points in * * * Indiana * * * taking Group Rate Bases Nos. 1 to 8, inclusive (or arbitraries higher), under Column 1 of W. T. L. Territorial Directory No. 1-C."* These were points in the Chicago Switching District such as Hammond, all of which are in the extreme northwesterly corner of the state, and points on the line of the New York Central which runs along the western border of Indiana from the Chicago Switching District to Danville, Ill. (R. 335, note 8; Joint Ex. 13, *e. g.*, pp. 381-2, 385-6.) Tariff 1-Y must therefore be read as fixing the eastern boundary of the territory covered thereby at the specifically defined line along the western border of Indiana. Kokomo is approximately 75 miles east of that line. (R. 335, note 8.)

The controlling principle is that quoted by the Court of Appeals from *Procter & Gamble Distributing Co.* v. *B. & O. R. Co.*, 174 I. C. C. 350, 351, "that a tariff must be construed in its entirety, considering both the limitations on its title-page and the rules contained therein." (R. 336.) In that case it was held that an intermediate rule cannot be used to extend the territorial scope of a tariff in instances where the territorial limitations are clearly defined on the title page or in the body of the tariff.

The *Procter & Gamble* case was not overruled in *Armour & Co.* v. *C. B. & Q. R. Co.*, 215 I. C. C. 537. This is clear from the discussion of these cases by the Court of

*It is well settled that where one tariff makes reference to another tariff, the matter so referred to is thereby incorporated in and made a part of the tariff making the reference. *Lammert Furniture Co.* v. *S. Ry. Co.*, 126 I. C. C. 197, 198; *Pyott Sand & Gravel Co.* v. *A. T. & S. F. Ry. Co.*, 148 I. C. C. 636, 639.

Appeals. (R. 335-6.) As the Court pointed out, the tariff provisions involved in the *Armour* case limited only inferentially and by general language of the title page the applicability of the intermediate rule, whereas here the limitation is specific and unequivocal not only on the title page but also in the item naming the rate. (R. 335, note 8.) Moreover, as an examination of the *Armour* case will plainly show, the points there claimed to be intermediate were actually located geographically *within* the territorial scope of the tariff. In the present case the claimed intermediate point, Kokomo, is 75 miles *beyond* the explicit territorial limits of the tariff.

IV.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THE PRACTICAL CONSTRUCTION OF THE TARIFFS.

The Court below found no uncertainty in the tariff language under review, and the foregoing discussion has briefly shown that conclusion to be sound. But petitioners' cause would not be helped even if an issue of ambiguity could be raised because the practical construction which the Commission and petitioners placed on the tariff provisions in question destroys all basis for the present claims. This Court has recognized that the rule of practical construction is applicable to any written instrument, whether it be a contract (*Topliff* v. *Topliff*, 122 U. S. 121, 131), a statute (*Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 417-8), or the Constitution of the United States (*McPherson* v. *Blacker*, 146 U. S. 1, 27). The Interstate Commerce Commission has recognized the force of practical construction as applied to tariffs. In *Swift & Co.* v. *Alton R. Co.*, 263 I. C. C. 245, the Commission rejected a contention urged by the shipper that was op-

posed to the consistent, day-to-day interpretation and application which had been given to the involved tariffs by all concerned. The Commission said at page 253:

> "The facts that heretofore shippers, including complainant, the railroads, and this Commission have uniformly construed the tariffs as the carriers have applied them on this traffic; that the existing rate relations have been fixed based upon that construction; and the further important fact that complainant was not misled to its damage by the intermediate rule, properly may be, and they have been, considered in determining the issue here presented."

The record shows beyond question a practical construction of the tariffs consistent with the rates assessed by respondents and paid by petitioners, and in accord with the construction placed upon the disputed provisions by both of the Courts below. That evidence will be summarized here in the briefest possible form.

(a) Practical Construction by the Commission.

The Commission, in at least five decisions, has recognized as proper the rates on fresh meats assessed by respondents on shipments involved in these cases.

In *Swift & Co.* v. *N. Y. C. R. Co.*, 220 I. C. C. 171, decided in 1937, the Commission dismissed complaints attacking the rates on fresh meats from St. Paul, Minn., and Missouri River origins to eastern destinations, finding (220 I. C. C. at 188) that the applicable rates on fresh meats to New York were $1.06½ from St. Paul, and $1.15 from Missouri River cities such as Kansas City, Omaha and Sioux City. (Carriers' Ex. 6.) In *Fresh Meats from Iowa and Minnesota to the East*, 227 I. C. C. 765, an outgrowth of the foregoing case decided the following year, the Commission repeated its finding as to the applicable

rates. (227 I. C. C. at 789; Carriers' Ex. 7.) When subjected to general percentage rate increases authorized by the Commission shortly prior to the beginning of the period here involved, the foregoing rates became $1.12 and $1.21, respectively (R. 316), which are the rates collected by respondents and found by the Courts below to be applicable on the shipments under consideration.

In *Swift & Co.* v. *Alton R. Co.*, 262 I. C. C. 783, the Commission dismissed complaints in which four of the present petitioners—Swift, Armour, Cudahy and Wilson—attempted to defeat the rate of $1.21 from the Missouri River to New York which the carriers had there assessed, and which is the rate found applicable by the Courts below on Shipments Nos. 2, 3, 4 and 2-A. (Carriers' Ex. 8.) In *Swift & Co.* v. *B. & O. R. Co.*, 268 I. C. C. 85, the Commission dismissed complaints in which Swift, Cudahy and Armour contended that the applicable rates on fresh meats from St. Paul to eastern destinations were lower than those assessed by the carriers, such rates having been assessed on the same basis as the rates here found applicable by the lower courts. (Carriers' Ex. 11.) In *Superior Packing Co.* v. *B. & O. R. Co.*, 276 I. C. C. 1, the Commission dismissed a complaint in which Superior (one of the petitioners here) challenged as inapplicable the rates assessed by the carriers on fresh meats from St. Paul to eastern destinations. The Commission expressly found that the applicable rate from St. Paul to New York during the period involved was $1.12, which is precisely the rate claimed applicable by respondents and found to be applicable by the Courts below on Shipment No. 5. (Carriers' Ex. 12.) In the first and third of the foregoing cases the shipments moved during the period involved here, and in the second of the cases shortly after. All three cases were decided by the

Commission while the present actions were pending in the District Court, and involved intermediate-rule contentions similar to those here advanced by petitioners.

(b) Practical Construction by Petitioners.

By various acts, both informal and formal, petitioners have adopted and expressed a practical construction of the tariffs under review that cannot be reconciled with the claims urged in these cases. The routine business practices of petitioners, relative to this controversy, were covered by the stipulation of facts upon which these cases were tried (R. 290, 315-16), and were summarized by the District Court in the following significant finding:

> "Both before and after the filing of these suits, the shippers voluntarily paid, without protest, the rates claimed applicable by the carriers. The freight charges on most of the shipments were prepaid at the several points of origin. Three of the shippers—Swift, Cudahy and Morrell—prepared the bills of lading covering all of their shipments and inserted therein the rates paid and here claimed applicable by the carriers. The other shippers did not insert any rates in the bills of lading covering their shipments; but the rates paid by Armour on shipments from South Omaha, Nebraska, were those shown as applicable in rate statements which it furnished the carriers' joint agent at that point." (R. 198-9, fdg. 9.)

The every day business construction of the tariffs evidenced by the foregoing finding is in complete accord with public representations made by petitioners from time to time while many of the present claims were pending in the District Court. On this point the District Court made the following finding:

> "During the period of the pendency of these suits, Armour, Cudahy, Swift and Wilson made numerous

representations to the Interstate Commerce Commission, by testimony, exhibits, petitions and briefs, that the rates on fresh meats from a number of points of origin to various points of destination involved in this consolidated cause were the rates assessed, and here claimed applicable, by the carriers on shipments involved in this case." (R. 199, fdg. 10.)

An illustration of the representations referred to by the Court in the foregoing finding is a petition for reconsideration that Armour filed with the Commission shortly before the trial of the present case in the District Court. After reviewing the several decisions of the Commission dealing with rates on fresh meats, the petition stated by way of summary:

"A minor rate change, not necessary to describe here, occurred in 1935. By reason thereof, the rate [to New York City] became, and until July 1, 1946, remained: From Sioux City • • • 1.21; Omaha • • • 1.21; Kansas City • • • 1.21." (Carriers' Ex. 14, p. 24.)

The foregoing statement and several others of the same purport (Carriers' Exs. 13, 14, 15, 16, 19 and 21) were made by responsible shippers to the agency having primary jurisdiction of the subject matter, and reflected a construction of the tariffs under consideration fully in accord with the decision below and thoroughly inconsistent with petitioners' present claims.

Conclusion.

In denying petitioners' claims, the Court of Appeals merely applied well settled principles of construction to the particular tariff language in controversy. No ground warranting review by this Court has been presented.

Respectfully submitted,

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